STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2006
v	No. 256618 Gogebic Circuit Court
JANIELLE RENEE EGGERS, Defendant-Appellant.	LC No. 03-000269-FH

Before: Murray, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals as of right her conviction of manufacturing at least 20, but less than 200, marijuana plants, MCL 333.7401(2)(d)(ii). Defendant was sentenced to probation for eighteen months, the first six months to be served in jail. We affirm.

I. Background

This case arises from the discovery by police of several marijuana plants growing on a parcel, on which a residential duplex stood, on July 30, 2003, near Michigan's border with Wisconsin. Glenn Gauthier, a trooper with the Michigan State Police, testified that, while executing a search warrant, the police discovered marijuana plants behind the dwelling, along with seeds, stems, and "lots of paraphernalia" inside. The plants were pulled up, bagged, and sealed.

John Kindlarski, a detective sergeant from a Wisconsin jurisdiction, testified that in all 43 marijuana plants were found on the premises. Twenty-three of them were tested by a drug analyst with the state police, who confirmed that they were marijuana.

Defendant lived in one of the units in the duplex, along with codefendant, Tony Arispe. Officer Gauthier testified that defendant admitted to smoking marijuana, and that the quantities of that substance that the police discovered belonged to her and Arispe, who intended it solely for their personal consumption. Gauthier continued that Arispe admitted that plants found in a window box were his, but stated that those growing in the ground were the work of a friend, whom he did not name.

Defendant and Arispe were tried together, over defendant's objection and request for severance.[1] The jury found Arispe guilty, along with defendant, of manufacturing at least 20, but fewer than 200, marijuana plants.

II. Analysis

A. Confrontation Clause

On appeal, defendant contends that the trial court violated her constitutional rights under the Confrontation Clause when it admitted nontestifying codefendant's statement to the police inculpating her. We disagree.

We review a trial court's general determination of the admissibility of evidence for an abuse of discretion; however, the determination of whether evidence is admissible under a rule of evidence is a matter of law subject to de novo review. *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004). Generally, to be considered timely, an objection to the admission of evidence should be interjected between the question and the answer. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). Here, defense counsel failed to object to the introduction of Arispe's statement to the police until portions of that statement had been admitted. Where a defendant fails to raise a timely objection to the admission of evidence, any error is forfeited unless the error was plain and affected the defendant's substantial rights. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001).

In *Crawford v Washingon*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court articulated a bright-line rule that, to admit testimonial evidence against a defendant, the Confrontation Clause requires the unavailability of a witness and a previous opportunity for cross-examination. See also *People v McPherson*, 263 Mich App 124, 132; 687 NW2d 370 (2004). The Court overruled its prior decision in *Ohio v Roberts*, 448 US 56, 65-66; 100 S Ct 2531; 65 L Ed 2d 597 (1980), which held that testimonial evidence was admissible upon a judicial determination of reliability. *Crawford*, *supra* at 68-69. The *Crawford* Court reasoned that reliability is an "amorphous" concept and that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id*. at 62-63. Although the *Crawford* Court "[left] for another day any effort to spell out a comprehensive definition of 'testimonial,'" it noted that "[w]hatever else the term covers, it applies at a minimum . . . to police interrogations." *Id*. at 68.

Here, it is not disputed that Arispe's statement to Officer Gauthier was testimonial evidence and that Arispe did not testify, and thus was not available for cross-examination. However, the prosecution argues that Arispe's statement, as recounted by Officer Gauthier, was not ultimately adverse to defendant.

[1] Defense counsel moved the court to sever the proceedings, but over a jury-selection issue, not for the reasons involved with this appeal.

The Sixth Amendment precludes admission of a nontestifying codefendant's confession at a joint trial, but only if the statements incriminate the defendant. *People v Frazier*, 446 Mich 539, 546; 521 NW2d 291 (1994). See also *Cruz v New York*, 481 US 186, 192-193; 107 S Ct 1714; 95 L Ed 2d 162 (1987), and *Richardson v Marsh*, 481 US 200, 207-209, 211; 107 S Ct 1702; 95 L Ed 2d 176 (1987). Arispe implicated defendant in the ownership of several items of paraphernalia found inside the premises, including smoking devices, lighters and cigarette papers. However, Arispe implicated only himself and an unnamed friend in ownership of the marijuana plants at issue. According to Officer Gauthier, Arispe said that "the 30 marijuana plants in the window box were his and that the other 13 belonged to a friend." While Arispe's confession implicated defendant in the possession of certain drug paraphernalia, defendant was charged with manufacturing marijuana, or cultivating those plants, not simple possession. Therefore, Arispe's confession did not directly implicate defendant in the crime charged.

Moreover, Arispe's statement that he and his unnamed friend owned the marijuana plants was not indirectly accusatory of defendant in the manufacturing charge, except to the extent that the jury might have supposed that this friend was in fact defendant. But Arispe's unhesitating identification of defendant as owner of much of the drug paraphernalia should have militated against his becoming suddenly reticent when discussing ownership of the plants themselves, if it was indeed defendant he was hoping to protect. Because Arispe's statements did not inculpate defendant in the charged offense of manufacturing of marijuana, we conclude that there was no plain error requiring reversal.

Even if the trial court violated defendant's right of confrontation by admitting the statement of a nontestifying codefendant into evidence, we hold that defendant failed to show that her substantial rights were affected. To prove that substantial rights were affected, a defendant must demonstrate prejudice by showing that an error affected the outcome of the proceedings. *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004). Arispe's statement was not the primary evidence supporting defendant's conviction. Rather, the primary evidence of defendant's guilt was her own incriminating statement to the police. Defendant implicated herself in connection with growing those plants when, during an interview, defendant told Officer Gauthier that "the marijuana was [Arispe's] and hers and that they were only growing it for personal use."

We have previously held that, "[i]f evidence properly admitted against the defendant is strong and the prejudicial effect of the codefendant's admission is insignificant in comparison, the admission is harmless." *People v Harris*, 201 Mich App 147, 150; 505 NW2d 889 (1993). Based upon this reasoning, we have concluded that a defendant's own incriminating statements may render harmless an error in the admission of a nontestifying witness' statement. *McPherson*, *supra* at 135 n 10. Moreover, "[a] codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told . . . ." *Cruz*, *supra* at 192.

Arispe's statement differed from defendant's statement regarding ownership of the marijuana plants. Arispe did not implicate defendant in the plant ownership; rather, he claimed that he and an unnamed friend owned the marijuana plants. Defendant admitted that the marijuana belonged, in part, to her and that she and Arispe were growing it for personal use. Accordingly, Arispe's confession was relatively insignificant in comparison to defendant's own

admission, and it is reasonable to conclude that the challenged testimony did not contribute to defendant's conviction in this case.

B. Jury Instructions

Defendant also contends that the trial court erred in refusing to instruct the jury on the necessarily included lesser offense of possession of marijuana. We disagree.

We review de novo questions of law, including questions regarding the applicability of jury instructions. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). Moreover, the determination of whether an offense is a lesser offense is a question of law that we review de novo. *People v Nickens*, 470 Mich 622, 625-626; 685 NW2d 657 (2004).

In *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002), the Michigan Supreme Court held that a lesser offense instruction is proper only where the lesser offense is necessarily included in the greater offense. "Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense." *People v Mendoza*, 468 Mich 527, 532 n 3; 664 NW2d 685 (2003). Conversely, "[c]ognate offenses share several elements, and are of the same class or category as the greater offense, but the cognate lesser offense has some elements not found in the greater offense." *Id*. at 532 n 4. Thus, an instruction on a lesser offense is appropriate only where "all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction." *Id*. at 533.

Therefore, to determine whether possession of marijuana is an inferior offense to manufacture of marijuana, the elements of each offense must be compared. MCL 333.7401(1) provides, in relevant part, "[A] person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance . . . ." Regarding the manufacturing of marijuana offense, the elements are: (1) the defendant manufactured a controlled substance; (2) the manufactured substance was marijuana; (3) defendant knew she was manufacturing marijuana; and (4) the substance was in a mixture that weighed five or more but less than 45 kilograms or consisted of 20 or more but fewer than 200 plants. See CJI2d 12.1. The term "manufacture" is defined as "the production, preparation, compounding, conversion, encapsulating, packaging, repackaging, labeling, relabeling, or processing of an imitation controlled substance, directly or indirectly." MCL 333.7341(1)(c). Regarding the mere possession of marijuana, the elements are: (1) the defendant possessed a controlled substance; (2) the substance possessed was marijuana; and (3) the defendant knew that she was possessing marijuana. See CJI2d 12.5. "Possession is a term that 'signifies dominion or right of control over the drug with knowledge of its presence and character.'" *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000), quoting *People v Maliskey*, 77 Mich App 444, 453; 258 NW2d 512 (1977). "Possession 'may encompass both actual and constructive possession.'" *Nunez*, *supra* at 615, quoting *Maliskey*, *supra* at 453; see also CJI2d 12.7.

While nonbinding on this Court, the Sixth Circuit has passed on this issue, in connection with federal statutes, and announced that "different evidence is required to support a charge of

possession and a charge of manufacture, and the respective charges represent separate offenses." *United States v Ursery*, 109 F3d 1129, 1136 (CA 6, 1997), citing 21 USC 841(a)(1) (manufacturing) and 21 USC 844 (possession).[2] Although the theories of manufacturing and possession in that case involved "different amounts of marijuana held at different locations and at different times," *id*., whereas the instant case involves a single quantity of growing marijuana plants, *Ursery's* recognition that manufacturing and possessing are separate offenses remains instructive. Moreover, this Court has determined that possession of a controlled substance is not a necessarily included lesser offense of delivery of that substance, reasoning that, while an argument could be made that "it is impossible for a party to manufacture, deliver or intend to manufacture or deliver a controlled substance without at least constructive possession of it," such an assertion "unnecessarily adds the element of constructive possession to the crime." *People v Binder (On Remand)*, 215 Mich App 30, 35; 544 NW2d 714 (1996), vacated in part on other grounds 453 Mich 915-916 (1996). This Court implied that some traffickers, particularly those occupying high positions within a "distribution chain," may well be directly involved in the sale of controlled substances without ever possessing them. *Id*. at 36.

Similarly, one can manufacture marijuana without possessing it. One could make labels for packages, devise a brownie recipe for baking marijuana into such form, or repair equipment intended to dry the leaves, all as part of a system to process marijuana for consumption, without ever possessing the actual marijuana. In connection with marijuana growing in the ground, one could come to the property and water plants owned by another, apply fertilizer, or pull nearby weeds, while neither actually handling, thus actually possessing, those marijuana plants, nor otherwise having authority to exercise dominion and control over them. As in *Binder*, we refuse to unnecessarily add the element of constructive possession to the offense of manufacturing marijuana. Because the offense of possession of marijuana contains an element not found in the greater offense, we conclude that possession of marijuana is a cognate lesser offense of manufacturing of marijuana. Thus, the trial court did not err by refusing to give the jury the requested instruction regarding possession of marijuana.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Henry William Saad

[2] See *Abela v General Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004) ("Although lower federal court decisions may be persuasive, they are not binding on state courts.").